Supreme Court, U.S.
FILED
AUG 21 1995
CLERK

No. 94-2112

In The

Supreme Court of the United States

October Term, 1995

DEL ORO HILLS,

Petitioner,

v.

CITY OF OCEANSIDE,

Respondent.

Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DONALD R. WORLEY
Counsel of Record

WORLEY, SCHWARTZ, GARFIELD & RICE
401 "B" Street, Suite 1150
San Diego, CA 92101-4245
(619) 239-0815
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY TO CITY'S STATEMENT OF FACTS

Regrettably, DEL ORO HILLS ("DEL ORO") must point out that it is CITY OF OCEANSIDE'S ("CITY") Statement of the Facts which is misleading.

First, the California Court of Appeal in *Building Industry Association of San Diego, Inc. v. City of Oceanside,* 27 Cal.App.4th 744 (1994) [Petition, Appendix B] did not address the trial court's ruling that Proposition A ("Prop. A") reasonably related to the public welfare, because to do so was unnecessary in light of Prop. A's invalidity for other reasons. Nonetheless, the Court of Appeal *reversed*

the entire judgment of the trial court. Thus, the trial court "ruling" to which CITY refers has not survived as the law of this case.

Second, the record will show that DEL ORO's principal (Robinhood Homes, Inc.) lost money on the villages it purchased from DEL ORO. Robinhood "profited" only as a haberdasher "profits" when he buys a tie for one dollar at wholesale and sells it for two dollars retail. There is no real profit, however, unless he has money left over after paying salaries, rent, the light and telephone bills, etc. The development of land is a business with a business's normal expenses, and it requires management with management costs. When those costs and expenses are taken into account, the evidence submitted to the trial court showed net losses to DEL ORO's principal from the Del Oro project.

REPLY TO CITY'S ARGUMENT

I

DEL ORO PURSUED ALL APPROPRIATE STATE JUDICIAL REMEDIES FOR ITS TAKING ACTION

CITY contends that this Court lacks jurisdiction because DEL ORO did not pursue a cause of action for "inverse condemnation" in the state court. This contention is invalid for several reasons.

A. DEL ORO Availed Itself of State Procedures for Bringing a Taking Claim.

DEL ORO first brought its taking claim in the state's trial court through a cause of action invoking 42 United States Code section 1983, and it pursued the taking claim through all appellate courts of the state before petitioning this Court. The trial court denied the claim on the basis that no taking had occurred. It never reached the issue of just compensation. DEL ORO was not required to do any more than to avail itself of available state *procedures* to obtain just compensation. So long as the state trial court had the first opportunity to rule upon the taking claim, the requirement of *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985) ("*Williamson*") is satisfied.

Most cases cited by CITY emphasize that to have a ripe taking claim, a plaintiff must avail itself of state *procedures* before bringing a claim in federal court. (See, e.g., *Gilbert v. City of Cambridge,* 932 F.2d 51, 63 (1st Cir. 1991).) As most succinctly stated in *Estate of Himelstein v. City of Fort Wayne,* 898 F.2d 573, 576 (7th Cir. 1990), "a federal taking claim is not ripe until it is apparent the state does not intend to pay compensation." It is now quite apparent the State of California does not intend to allow DEL ORO compensation.

B. Pursuit of Just Compensation is a Federal Law Claim, and DEL ORO Pursued Its Federal Law Claim in State Court.

"Just compensation" is a constitutionally-mandated remedy, so the state "inverse condemnation" cause of

action is basically a federal law claim. As this court stated in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("*First English*"):

> " . . . a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to just compensation."

A taking claim is decided with reference to federal decisions on the Fifth Amendment. Certainly, in California that is so. In *Long Beach Equities v. County of Ventura*, 231 Cal.App.3d 1016 (1991), the California Court of Appeal defines a taking in a manner identical to that of this Court:

> "To state a cause of action for inverse condemnation, LBE must plead facts which show either that: (1) the application of the general zoning laws to its property does not substantially advance a legitimate state interest; or (2) such laws deprive it of substantially all economically viable use of its land. [Citing *Agins*] . . . "

Indeed, there is no indication that the California substantive law on regulatory takings is any different than the federal law. Therefore, by bringing its section 1983 claim in the state trial court in the first instance, DEL ORO asked the state courts for a ruling on the taking issue and has satisfied the *Williamson* state judicial remedy ripeness requirement.[1]

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[1] While the Ninth Circuit Court of Appeal has ruled that it is not *mandatory* that a section 1983 action be brought in state court in the first instance (*Dodd v. Hood River County*, ___ F.2d

C. A Federal Regulatory Taking Claim is the Same as a California Inverse Condemnation Claim.

Under California law, whether a taking has occurred under California "inverse condemnation law" is synonymous with whether a regulatory taking has occurred under the Fifth Amendment. The California courts already decided, in the context of DEL ORO's section 1983 action, that under the Fifth Amendment no regulatory taking had occurred in this case. In California, if the substantive law were more stringent than federal law in its definition of taking, it would be unconstitutional. If California and federal law were the same, and to all appearances they are, then a state inverse condemnation law claim would be redundant to a taking claim brought under section 1983.[2]

___ (9th Cir. 1995) [95 Daily Journal D.A.R. 8730]), Senior Circuit Judge Tang, in his dissent, stated that the "state procedure" which *Williamson* mandates is, indeed, a *federal* taking claim through a section 1983 action brought in the state court, under its concurrent jurisdiction over section 1983 suits.

[2] There is no possibility that California's definition of a regulatory taking is less stringent than federal law. No California case even suggests such a view, and the California courts' previous nonconformance with other states on the availability of inverse condemnation damages for regulatory takings, which nonconformance triggered the *First English* decision, evidences the state's reluctance to find, and compensate for, regulatory takings.

D. The State Judicial Action Requirement Affects the Jurisdiction of Taking Cases Brought for the First Time in Federal Trial Courts.

The federal cases cited by CITY all deal with taking claims brought, if at all, in a federal district court in the first instance. No case cited by CITY, or known to DEL ORO, states that commencing a section 1983 action in *state* court, and obtaining a ruling that no taking has occurred, are not sufficient to support federal *appellate* jurisdiction over the taking issue.

E. The Pursuit of State Judicial Remedies, Even if Required, Should be Required Only of "As-Applied" Challenges.

DEL ORO had no realistic opportunity to seek approvals of development of its land, because of the condition of financial extremis created by the imposition of the invalid Prop. A, and, therefore, it should have been relieved of the conventional ripeness requirement of an application for use before bringing its as-applied challenge. However, the thrust of DEL ORO's Petition is that its *facial* taking claim was wrongly decided by the California courts.

This Court in *Williamson* did not address the issue whether the state judicial action ripeness hurdle, which stands in the way of as-applied challenges, also obstructs their facial counterparts. (*Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 505 (9th Cir. 1990) (*"Southern Pacific"*).) Some courts have found it does not. (See, e.g., *Crow-New Jersey, 32 Ltd. v. Township of Clinton*, 718 F.Supp. 378, 382-83 (D. N.J. 1989).) This Court often

has reached the merits of facial attacks without regard for ripeness consideration. (*Agins v. City of Tiburon*, 447 U.S. 255 (1980) ("*Agins*"); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981) ("*Hodel*"); *Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470 (1987) ("*Keystone*"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 438 U.S. 419 (1982) ("*Loretto*").)

While the Ninth Circuit in *Southern Pacific* decided that the same state court action ripeness considerations apply to facial challenges, it distinguished *Agins, Hodel, Loretto* and *Keystone* by noting that "all had to do exclusively with the question whether the regulation amounted to a taking." (922 F.2d at 506).[3] That is precisely the posture of DEL ORO's Petition: it deals exclusively with whether a regulatory taking has occurred. If it has, then DEL ORO expects this Court will return the case to the California courts for a determination of just compensation.

F. A State Inverse Condemnation Claim Would Have Been Futile.

It should be noted that DEL ORO filed its original complaint with the San Diego Superior Court on June 3, 1987, six days *before* the decision in *First English* on June

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[3] In a note, the Ninth Circuit Court of Appeal stated:

"This is not to say that all facial challenges to zoning restrictions will be subject to this hurdle. In some instances, as we have seen, it will not be an issue because the court is simply considering whether a taking has occurred, not whether it is a taking 'without just compensation.' . . . " (922 F.2d at 506, n. 11.)

9, 1987. At the time of the filing, California law did not provide a damages ready for a regulatory taking. Thus, a cause of action for inverse condemnation under state substantive law would have been futile.[4]

After *First English* was decided, DEL ORO amended its complaint.

Through the Seventeenth Cause of Action, DEL ORO directly addressed the impact of adoption of Prop. A and CITY's refusal, after DEL ORO's request, to exempt DEL ORO from Prop. A on the marketability of DEL ORO's land. The trial court dismissed this latter cause of action and granted summary judgment to the CITY after it decided a taking had not occurred. Thus, as more fully discussed above, the trial court decided the very same issue which it would have been called on to decide if DEL

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[4]"If the alleged 'taking' of Jama's property occurred before the Supreme Court decided *First English* [etc.], Jama's failure to seek compensation through state procedures might be forgiven as 'futile.' . . . Before *First English*, California law precluded a landowner from recovering damages on an inverse condemnation action for a temporary regulatory taking. [Citing *Agins*]." (*Jama Construction v. City of Los Angeles*, 938 F.2d 1045, 1048 (9th Cir. 1991).)

While DEL ORO included a Fifth Cause of Action for inverse condemnation, it was based on allegations that if Prop. A allowed *no* use of DEL ORO's property, DEL ORO's investment in an installation of public infrastructure would have been a "taking" and would have unjustly enriched the CITY. Because Prop. A ultimately allowed the use of DEL ORO's property, the cause of action related to the public improvements became moot, and so DEL ORO abandoned it.

ORO had brought an inverse condemnation cause of action under California substantive law in the first place.

II

PROP. A DID NOT SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS

With reference to CITY's arguments on the merits, DEL ORO will largely stand on its Petition. However, to the extent CITY relies so heavily on the purposes set forth in Prop. A itself (CITY's Opposition, pp. 11-16), DEL ORO offers the following observation from this Court's decision in *Bates v. Little Rock*, 361 U.S. 516, 525 (1960):

> "But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance."

CONCLUSION

The Petition continues to present issues necessary and appropriate for this Court's review, and the Petition should be granted.

Respectfully submitted,

DONALD R. WORLEY
Counsel of Record

WORLEY, SCHWARTZ, GARFIELD & RICE
401 "B" Street, Suite 1150
San Diego, CA 92101-4245
(619) 239-0815
Counsel for Petitioner